



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT SIAYA
SUCCESSION CAUSE NO. 181 OF 2016
(FORMERLY Kisumu Succession CAUSE No. 1336 OF 2013)
IN THE MATTER OF THE ESTATE OF AGNES OGOLAS AKOTH (DECEASED)
AND
IN THE MATTER OF AN APPLICATION BY:
GABRIEL NYACHONGA WANYANDE.....PETITIONER/APPLICANT

RULING

1. The Petitioner/Respondent petitioned court for grant of Letters of Administration intestate in Siaya Principal Magistrate's Court Succession case No. 76 of 2006 on 9th September 2006 in his capacity as a grandson to the deceased, Agnes Ogola Okoth. That on 11th December 2006 the petitioner was issued with temporary grant of letters of administration intestate to the deceased's estate.
2. The Objector herein filed objection to the making of the grant of representation to the deceased's estate to the petitioner dated 29th April 2010. The Principal Magistrate Siaya Law Court, issued notice to the petitioner dated 29.4.2013. That before the Magistrate's Court proceeded to do anything as regards the objection the firm of Mr. D.O.E. Anyul and Company Advocates through a letter dated 29.10.2013 sought that the lower court file be forwarded to Kisumu High Court for hearing and determination of the objection. The Principal Magistrate Court Succession Cause No. 76 of 2006 was subsequently forwarded to Kisumu High Court whereby it was registered as HCSC No. 1336 of 2013. That before the matter could be heard the same was transferred to this Court for hearing and determination following an order of the High Court at Kisumu dated 17th March 2016.
3. That pending the hearing of the objection dated 29th April 2010 the petitioner filed summons for confirmation of grant dated 30th June 2016 and immediately thereafter filed Notice of preliminary objection dated 11th July 2016.
4. That on 6th July 2016 when the matter came up for hearing Mr. Wakla, Learned advocate represented the petitioner/Respondent whereas Mr. K'opot, Learned Advocate represented the Objector. The court gave directions that the preliminary objection dated 11th July 2016 to the objection dated 29th October 2010 be heard first.
5. The preliminary objection dated 11th July 2016 is based on the following two main grounds:-

i. That the objection as taken out, is misconceived, bad in law and incompetent, the same having been taken, drawn as filed long after grant of letter of Administration had been made to the petitioner in this case.

ii. The objection is frivolous, vexatious or is otherwise an abuse of the process of the court.

6. Mr. Wakla, Learned Advocate for the petitioner/Respondent in support of the preliminary objection urged the two grounds set out in the preliminary objection, urging the objection by the Objector dated 29th April 2010 is incompetent, misconceived, bad in law as it was drawn and filed long after the Grant of Letters of administration had been made to the petitioner. He added that the same is frivolous, vexatious and/or an abuse of the court process. Mr. K'opot for the Objector rose to oppose the preliminary Objection on three broad general grounds. Thus the objections is not premised on the point of law, urging that it does not meet the threshold as laid down in the Courts of law and in support of his proposition relied on the case of **MUKISA BISCUITS MANUFACTURING COMPANY LIMITED V. WEST AND DISTRIBUTION LTD (1969) E.A. 696**. He urged a preliminary point of law should be based on points of law and not on disputed facts, that the preliminary point of law has not satisfied the conditions for it to be termed as a preliminary point of law, secondly he urged the court exercised its discretion to extend the time for filing an objection when it accepted the Objector's objection after a period of four (4) years and it issuing a notice to the petitioner/Respondent. He referred to **Rule 40 (1) of Probate and Administration Rules** and urged the court is supposed to consider whether there is any objection before the grant can be confirmed and further urged under **Section 70 of the Law of Succession Act**, Court has power before making a grant of representation to consider whether there is a dispute as to the grant. He urged the preliminary objection cannot succeed as the petitioner applied for grant way back in 2006 but sat on his rights. He urged the court to give direction on what the objectors should do as he filed the objection in accordance with the advice of the court staff urging the court to consider the matter under Article 159 (2) (d) of the Constitution of Kenya 2010 and do substantive justice rather than basing the ruling on a technicality.

7. Mr. Wakla, in brief rejoinder urged that the objection satisfied the conditions set out in the **Mukisa Biscuit Case (Supra)** as the objection is grounded on points of law and has set out specific provisions which the petitioner relies upon, that the facts are not indispute, that the preliminary objection has capacity to dispose the objection, that the filing of the objection did not amount to extension of time in accordance with **Section 68 of the Law of Succession Act, and Rule 17 (1) of the Probate and Administration Rules**, that as grant has been issued it can only be challenged by filing application for revocation or annulment of the grant and that **Article 159 (2) (d)** of the Constitution of Kenya 2010 is not applicable in this case.

8. The issues for consideration in the preliminary objection are as follows:

2. Whether the Objection as taken out is misconceived, bad in law and incompetent?

2. Whether the Objection is frivolous, vexatious or is otherwise an abuse of the process of the court?

9. The Objector's objection is brought pursuant to **Section 68 of the Law of Succession Act** which provides:-

“(68). (1) Notice of any objection to an application for a grant of representation shall be lodged with the court, in such form as may be prescribed, within the period specified by the notice, or such longer period as the court may allow”

10. The objection was drawn and filed on 29th April, 2010 objecting to the making of grant in the petition of Gabriel Nyachonga Wanyande filed in the Principle Magistrate's Court on 19th September 2006. The Notice to the petitioner was issued by the Court on the same day. The petition for the Grant of Letters of Administration intestate was filed on 19th September 2006 as per Court's record. The objection to the

making of the grant was in accordance with **Section 68 of the Law of Succession Act** Supposed to have been filed within the period specified by the Notice or such longer period as the court may allow. The notice referred to under **Section 68 of Law of Succession Act** is the Kenya Gazette.

11. In the instant cause the period specified by the notice, thus the Kenya Gazette Notice No. 8116 of 6th October 2006 is thirty (30) days which days expired on 5th November 2006. That the Objector did not file objection within the period specified in the notice provoking the Principal Magistrate's Siaya Court to issue Grant of Letters of Administration to the Petitioner. The objector after 4 years of waiting filed an objection on 29th October 2010 contrary to the Provisions of **Section 68 of the law of Succession Act**. The Objector has not disputed that the notice referred to is the Kenya Gazette Notice, however the Objector urges that by court's acceptance of his objection papers the court in doing so it extended period for filing an objection.

12. **Section 68 of the Law of Succession Act** makes it clear that objection may be lodged with the Court, in such form as may be prescribed within a period specified by the notice, or such longer period as the court may allow. The period in this case is the one that is specifically specified by the notice, thus the Kenya Gazette Notice. The notice in the Kenya Gazette Notice No. 8116 dated 6th October 2006 was 30 days and no more. The longer period can only be granted by court in exercise of its Judicial functions and not administrative functions. That before court can grant such a longer period a formal application ought to be filed, considered and appropriate orders granted. In the instant case no application was made and no orders were made by the court granting longer period beyond the 30 days as per published Kenya Gazette No. 8116 of 6th October 2006. That in receiving the objection the court was performing its administrative functions and the court staff did not in my view extend the period of filing of the objection. That if that would be taken as the correct position it would mean on filing any document before a court it would amount to granting the prayers sought. **Rule 17 (1) (2) of the Probate and Administration Rules** is very clear as to how objections, answers and applications ought to be initiated before court. It provides:-

“17. (1) Any person who has not applied for a grant to the estate of a deceased and wishes to object to the making of a grant which has been already applied for by another person may do so by lodging within the period specified in the notice of the application published under rule 7 (4), or such longer period as the court may allow, either in the registry in which the pending application has been made or in the principal registry, an objection in Form 76 or 77 in triplicate stating his full name and address for service, his relationship (if any) to the deceased and the grounds of his objection.

(2) A request by an intending objector for an extension under section 68 (1) of the Act of the period specified in the notice under rule 7 (4) shall be made to the registry at which the application for a grant was made or by which the notice was issued, as the case may be, by summons supported by an affidavit, if necessary, and upon notice to the applicant for the grant.”

13. The above **Rule 17 (2) of the Probate and Administration Rules** is clear that for seeking an extension of a longer period the objector is required to file an application to the registry at which the application for grant was made or by which notice was issued by summons supported by an affidavit, if necessary, and upon notice to the applicant for the grant. The filing of an objection after the period given in the published Kenya Gazette has lapsed and receipt of the objection by registry cannot suffice as urged by the objector's counsel.

14. In the instant case the objection was filed when grant had already been made. The delay in filing of the objection of 4 years is inordinate and unexplainable. The objector is objecting to the making of the grant after it has already been made and I find that the objection has already been overtaken by events. The court cannot stop what has already passed. The law of Succession is crafted in such a manner that the obtaining of the grant is not an end to aggrieved party's rights. One can challenge the grant by seeking its revocation or annulment or even file a protest to the mode of distribution.

15. Whether the preliminary point of law is based on points of law? I have considered the preliminary

objection in regard to objection raised by Mr. K'opot that the objection is not based purely on points of law but on disputed facts and that therefore this court in dealing with the objection wont reach final decision on the matter before court. I have relooked at the preliminary points of objection and I am satisfied that they meet the test set out in the **Mukisa Biscuits Case (Supra)**, The objections are grounded on pure points of law and provisions relied upon herein has been stated in the submissions. The facts of the case are not disputed and the objections which are raised if successful shall determine the outcome of the objection in the case.

16. Mr. K'opot urged the court in considering the preliminary objection should consider the provisions of **Article 159 (2) (d) of the Constitution** which enjoins courts to do substantive justice and not to base the decision on procedural technicalities. **Article 159 (2) (d) of the Constitution of Kenya 2010** provides:-

“**159 (2)** In exercising judicial authority, the courts and tribunals shall be guided by the following principles:-

(d) justice shall be administered without undue regard to procedural technicalities; and”

17. The Law of Succession is a self contained Act of Parliament which has clearly set out provisions on how matters of succession cause can be dealt with. An aggrieved party cannot ignore the express provisions of the law like in the case in raising any matter regarding specific provisions in the Act and claim that he is doing so, so as to get substantive justice in respect of his claim. In my view even when a party is seeking substantive justice, such justice must be attended to through some definite process. **Article 159 (2) (d) of the Constitution** in regard to administration of justice without undue regard to procedural technicality do not therefore mean we do away with all rules of procedure, as doing so would breed anarchy and would mean injustice to those who are vulnerable or weak or un cunning. Procedures and rules are in my view good, and makes things move in an orderly and predictable manner and cannot be wished away.

18. **The Upshot is that I find the preliminary objection is meritorious and should be allowed. The Objection as taken out is misconceived, bad in law and incompetent having been overtaken by events as it was drawn and filed long after Grant of letters of Administration had been made to the Petitioner in this cause. The Objection is frivolous, vexatious or otherwise an abuse of process of the court. The same is struck out.**

19. The Petitioner/Respondent is awarded costs of the Objection.

DATED AND SIGNED AT SIAYA THIS 13TH DAY OF OCTOBER 2016

J. A. MAKAU

JUDGE

DELIVERED IN THE OPEN COURT THIS 13TH DAY OF OCTOBER 2016

IN THE PRESENCE OF:

MR. WAKLA FOR PETITIONER/RESPONDENT

MR. K'OPOT FOR THE OBJECTOR

C.C. K. ODHIAMBO

L. ATIKA

J. A. MAKAU

JUDGE